

ARKANSAS SUPREME COURT

No. 06-917

MELVIN SMITH, JR.
Appellant

v.

MIKE HUCKABEE, GOVERNOR, AND
INSTITUTIONAL PAROLE SERVICES
Appellees

Opinion Delivered March 8, 2007

PRO SE APPEAL FROM THE CIRCUIT
COURT OF JEFFERSON COUNTY, CV
2006-353, HON. ROBERT HOLDEN
WYATT, JR., JUDGE

AFFIRMED.

PER CURIAM

Appellant Melvin Smith, Jr., an inmate incarcerated in the Arkansas Department of Correction (“ADC”), filed a pro se petition for declaratory judgment or, alternatively, a writ of mandamus in Jefferson County Circuit Court. The circuit court denied the petition, and appellant brings this appeal of that order.

Appellant is serving a life sentence on a conviction of first-degree murder. The appellees do not contest that appellant was recommended for executive clemency by the parole board and that the governor, despite that recommendation, denied appellant’s request for clemency and commutation of his sentence to a term of years. Appellant attached to his petition documents from the Post Prison Transfer Board and ADC and a letter from the governor’s office that support these undisputed facts, and the appellees also attached a number of documents to their response that further supported those facts. The parties also agree that Act 93 of 1977, codified as Ark. Stat. Ann. § 43-2829 (Repl. 1977),

was the applicable law at the time of the murder and is controlling as to parole eligibility for appellant's conviction for first-degree murder.

In his petition, appellant appears to have contended first that the governor had somehow applied a later, harsher statute than section 43-2829 to effectively lengthen his sentence, that subsection (C) of section 43-2829 imposed standards constraining discretion in granting executive clemency, and that the governor had previously granted clemency applications in accord with recommendations of the parole board. Appellant next argued that the alleged constraints on discretion in section 43-2829(C) created a liberty interest and that the governor's actions in failing to follow the statute violated his due-process rights. Appellant's final argument contended that Institutional Parole Services had failed to follow its own procedures because it had not established his parole date and good-time allowance.

The circuit court dismissed the petition with prejudice. The court found that the petitioner had not stated any facts or advanced any evidence to support his claim, based upon an examination of the pleadings and all other matters before the court. The order indicated that the dismissal was pursuant to Ark. R. Civ. P. 12(b)(6). On appeal, appellant advances two points for reversal. In the first, he contends that the court erred in summarily dismissing the petition and in determining that he failed to state facts and evidence to support his claims. In the second point, appellant argues that the court erred by dismissing the petition prior to ruling on his motion for discovery.

Although the court's order indicated that the petition was dismissed under Rule 12(b)(6), there were matters outside the pleadings considered by the court, and we accordingly treat the order as one for summary judgment. *See Williams v. Ark. Dep't of Corr.*, 362 Ark. 134, 207 S.W.3d 519 (2005). Summary judgment is granted when there are no genuine issues of material fact, and the

moving party is entitled to judgment as a matter of law. *Nielsen v. Berger-Nielsen*, 347 Ark. 996, 69 S.W.3d 414 (2002). On review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* at 1004, 69 S.W.3d at 418. We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving parties. *Id.*

Because we treat the dismissal of the petition as a grant of summary judgment, that the trial court may have erred in determining that appellant had failed to state facts or advance evidence in support of his claim is of no consequence. We may affirm a grant of summary judgment whether or not the court below announced the wrong reason. *Williams*, 362 Ark. at 141, 207 S.W.3d at 525. Here, there are no genuine issues of material fact, the appellees are entitled to judgment as a matter of law, and we accordingly affirm the grant of summary judgment.

We examine appellant's claim for declaratory judgment first. This court has said that declaratory relief lies where four requisite conditions are met, as follows: (1) there is a justiciable controversy; (2) it exists between parties with adverse interests; (3) those seeking relief have a legal interest in the controversy; (4) the issues involved are ripe for decision. *Jegley v. Picado*, 349 Ark 600, 80 S.W.3d 332 (2002). On appeal, the question as to whether there was a complete absence of a justiciable issue shall be reviewed de novo on the record of the trial court. *Id.* at 611, 80 S.W.3d at 336.

The crux of appellant's argument is that section 43-2829 provides that he is entitled to be considered for parole. Appellees agree that the statute controls parole eligibility in this case, although they disagree with appellant's contention that subsection (C) is applicable, instead arguing

that section 43-2829(B)(1) applies. We agree that subsection (C) has no application here, even though appellant contends that he fell within the age requirements of that subsection, because appellant was committed to the ADC for life on the first-degree murder charge, and not for a term of years.

Appellant contends that under either subsection of the statute, he is entitled to parole, asserting that the language in section 43-2829(B)(1) imposes constraints on the discretion to grant clemency and entitles him to have his sentence commuted to a term of years because the parole board recommended clemency. We do not agree that the statute imposes such constraints.

Section 43-2829(B)(1) provides for eligibility for release on parole as follows:

Inmates under sentence of death or life imprisonment without parole shall not be eligible for release on parole but may be pardoned or have their sentence commuted by the Governor as presently provided by law. Inmates sentenced to life imprisonment shall not be eligible for release on parole unless such sentence is commuted to a term of years by executive clemency. Upon such commutation, the inmate shall be eligible for release on parole as provided in this section.

The second sentence provides that inmates serving life sentences are not eligible unless that sentence is commuted through executive clemency. Clemency was not granted here, and the statute simply does not provide for any limitations on the discretion to grant clemency. It does not require the governor to follow parole board recommendations or otherwise place restrictions on the governor's discretion.

Moreover, any limitations on the governor's discretion would conflict with the exclusive power granted that executive officer under Ark. Const. art. 6, § 18. Under our constitution, the executive branch has sole authority to grant clemency. *Coones v. State*, 280 Ark. 321, 657 S.W.2d 553 (1983) (citing *Smith v. State*, 262 Ark. 239, 555 S.W.2d 569 (1977)). Legislative action cannot

override constitutional provisions. *Abbott v. State*, 256 Ark. 558, 508 S.W.2d 733 (1974). Appellant did not point to any other statute that might have application to a request for clemency and the governor is not required to follow any statute in determining whether to grant a request for clemency. Appellant's due-process argument also fails under this analysis, as there are no constraints in the statute, or any statute, that the governor failed to follow.

Because there was no justiciable controversy here, appellees were entitled to summary judgment on the request for declaratory judgment. For these same reasons, appellant's arguments concerning his request for a writ of mandamus to compel a grant of clemency and to establish a parole eligibility date and good-time allowance fail.

The purpose of a writ of mandamus is to enforce an established right or to enforce the performance of a duty. *Manila School Dist. No. 15 v. Wagner*, 357 Ark.20, 159 S.W.3d 285 (2004). It is issued by this court only to compel an officer or judge to take some action. *Arkansas Democrat-Gazette v. Zimmerman*, 341 Ark. 771, 20 S.W.3d 301 (2000). A petitioner must show a clear and certain right to the relief sought and the absence of any other adequate remedy when requesting a writ of mandamus. *Id.* at 777, 20 S.W.3d at 304. Here, appellant failed to show a clear and certain right to relief when he failed to allege any limitations on the governor's discretion. While appellant maintains that such constraints are present, the statute clearly does not support that contention.

Because there were no genuine issues of material fact and because the appellees were entitled to judgment as a matter of law as to both the claim for declaratory judgment and the claim for a writ of mandamus, summary judgment was appropriate. As to appellant's argument that further discovery should have been allowed, there was no material fact unanswered that might have been produced through further discovery. As previously discussed, the parties agreed as to the relevant

facts, and the controlling statute was not in dispute. We therefore affirm the grant of summary judgment.

Affirmed.